

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

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**Midwest Independent Transmission  
System Operator, Inc.**

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**Docket No. ER04-691-000**

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**MOTION TO FILE COMMENTS  
OUT OF TIME AND  
COMMENTS OF THE  
ILLINOIS COMMERCE COMMISSION**

Pursuant to Rule 212 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. 385.212, the Illinois Commerce Commission ("ICC") submits this motion to file comments out of time and comments in response to the filing submitted by the Midwest Independent Transmission System Operator ("MISO") on March 31, 2004, in the above-captioned docket.

On May 6, 2004, the ICC filed a notice of intervention in this proceeding. On May 7, 2004, the Organization of MISO States ("OMS") filed Comments on MISO's March 31 Transmission and Energy Markets Tariff ("TEMT") filing. The OMS filed an Errata to those comments on May 10, 2004. While the ICC was actively involved in the drafting of the OMS comments, the OMS Board of Directors did not approve the OMS comments until May 5 and the ICC did not receive the final draft of the OMS comments until very close to the Commission's May 7 comment deadline. Therefore, the ICC was unable to adequately review the final OMS Comments in response to MISO's filing in this docket with sufficient time to respond before the Commission's comment deadline.

Accordingly, the ICC now moves to file these comments out of time. The ICC is a party to this docket. These comments are limited primarily to clarifying the ICC's position on certain issues discussed in the OMS Comments. The ICC believes that these comments will not prejudice any other party and will help to clarify the record. Given these factors, the ICC requests that the Commission grant this motion to file comments out of time.

## **COMMENTS**

As stated above, these ICC comments addressing the MISO March 31, 2004, filing respond primarily to those Comments filed by the OMS on May 7, 2004, and its accompanying Errata filed on May 10, 2004, in the above-captioned docket. In general, the ICC agrees with many of the positions taken in the OMS Comments. However, there are several issues where the ICC's position significantly differs from that represented in the OMS Comments. Therefore, the ICC wishes to make those points of significant disagreement known to the Commission. The main points in the OMS Comments on which the ICC differs from the OMS majority are discussed below.

### **1. Restoring Curtailed FTRs**

Paragraphs 49-55 of the OMS Comments address the issue of safety nets for restoring curtailed financial transmission rights ("FTRs"). In short, the OMS Comments argue that the FTR allocation provisions in the TEMT do not completely satisfy several of the OMS' previously adopted Principles regarding the allocation of FTRs, and in particular, the safety net principle. It is the ICC's position, however, that the tariff provisions contained in MISO's TEMT for FTR allocation satisfactorily address the OMS principles. In particular, the OMS' safety net principle is addressed in Section 43.2.6 of the TEMT. Section 43.2.6 will allow state commissions to

institute remedial procedures to restore any curtailed FTRs. Section 43.2.6 would also require MISO to grant such restoration requests if the requests are accompanied by instructions from the state commission explaining how the effects of restoring the curtailed FTRs will be allocated among market participants falling under the jurisdiction of that state. This alternative process will be available at the discretion of each state and would be subject to Commission approval.

The OMS Comments advocate that additional FTR restoration provisions be added to MISO's TEMT with the implication that the costs of these additional FTR restorations be recovered through uplift to other market participants.<sup>1</sup> The ICC believes that the OMS' recommendation in this regard is inappropriate, as it would allow states that are likely to incur above-average FTR curtailment, to shift the costs of restoring their FTRs to other states. Section 43.2.6 of the TEMT appropriately ensures that the unavoidable effects FTR curtailments are spread among only the individual state's jurisdictional entities. The ICC, accordingly, urges the Commission not to adopt OMS' recommendations on this issue.

## **2. Special Treatment of Grandfathered Agreements**

Section 38.8.4 of Module C of the TEMT proposes to retain the special treatment for GFAs until, at least, February 1, 2008. Section 38.8.4 also requires MISO to file a new proposal no later than February 1, 2007 regarding the treatment that will be accorded to GFAs beginning February 1, 2008. Nothing in the proposed TEMT precludes MISO's February 1, 2007, filing from continuing special treatment for GFAs in some form.

Paragraphs 67-68 of the OMS Comments address the issue of special treatment of grandfathered agreements ("GFAs"). Specifically, the OMS recommends that the Commission open an investigation to determine the impact of the special treatment of GFAs on: (1) other market participants; and (2) the efficiency of the operation of the MISO energy markets. This

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<sup>1</sup> OMS Comments, at P. 54.

investigation would determine whether or not the special treatment of GFAs past the February 1, 2008, transition period would be just and reasonable.<sup>2</sup>

The ICC does not oppose the OMS recommendation for an investigation. However, the ICC would rather see the Commission definitively establish, now, a firm sunset date of February 1, 2008 for the elimination of the special treatment of GFAs. While the ICC understands that some reason exists to support a transition period for special treatment of GFAs through February 1, 2008, there should be no special treatment of GFAs after that date. Nor should MISO's currently proposed GFA special treatment be replaced by any substitute special treatment for the period after February 1, 2008.

### **3. Performance Metrics**

Paragraphs 102-119 of the OMS comments address the issue of Performance Metrics. In particular, the OMS Comments assert that MISO is not making satisfactory progress toward market readiness, that MISO's readiness performance metrics are inadequate, and that MISO is failing or will fail numerous market readiness metrics.<sup>3</sup>

It is the ICC's position that the OMS Comments fail to provide any support for such assertions. Further, the ICC believes that the assertions made by the OMS are either wrong, or there is simply insufficient information to justify the OMS' drawing of such conclusions.

This section of the OMS' Comments exhibits a misplaced emphasis on completing a host of potentially unnecessary requirements that may ultimately serve to distract MISO from focusing on issues truly relevant to MISO's readiness to begin operating its markets and the readiness of market participants. The ICC is becoming increasingly concerned that entities opposed to the idea of MISO operating markets are currently, and will continue, to use "check-

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<sup>2</sup> OMS Comments, at P. 68.

<sup>3</sup> OMS Comments, at P. 115-119

the-box exercises” that have no bearing on the ability of MISO to operate its markets to stymie MISO’s efforts to implement its markets. Accordingly, the ICC is apprehensive that MISO’s efforts regarding these metrics will never be sufficient in the eyes of entities that are not fully supportive of markets. While the ICC acknowledges that readiness is a critical issue, the Commission needs to take steps to ensure that MISO will have the flexibility necessary to allow MISO to focus on the real work necessary for market start-up.

To assure parties who are genuinely concerned about the readiness of MISO to operate markets and the readiness of market participants to take part in MISO’s markets, the Commission should consider making a definitive statement that MISO will not be permitted to initiate market operations until the Commission, the OMS and MISO agree that the market is ready to be implemented. However, the ICC urges the Commission not to adopt OMS’ recommendation on this issue of performance metrics.

#### **4. System Support Resources**

Paragraphs 136-142 of the OMS comments address MISO’s proposed System Support Resources (“SSR”) Program found in Section 38.2.7 of the TEMT. In particular, the OMS Comments state that the SSR program is premature and should be removed from the TEMT.<sup>4</sup>

The ICC’s position is that the SSR program may need additional work. However, it would not be wise for the Commission to simply reject the SSR concept, as proposed by the OMS, because the program may still need some work. The ICC recommends that the Commission give particular attention to parties’ comments on the proposed SSR Program to identify any flaws that it may have so that those flaws can be addressed. However, the OMS recommendation to reject the SSR concept entirely is unreasonable.

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<sup>4</sup> OMS Comments, at P. 137 and P. 142.

The ICC does agree with the statement in the OMS Comments that the SSR Program proposed by MISO may be an important feature of the TEMT. Indeed, such a program may help to bolster reliability and is worthy of consideration. The ICC also notes that PJM Interconnection, LLC (“PJM”) and PJM’s stakeholders are currently working to develop for the PJM footprint a program with an intent that appears to be similar to that in MISO’s SSR Program. The ICC also believes that the idea of the Commission allowing the OMS Resources Adequacy Working Group (as assigned by the OMS Board of Directors) to further explore development of the SSR concept in concert with MISO has some merit.

Accordingly, the ICC recommends that the Commission allow provisions regarding the proposed SSR Program to remain in the TEMT and that the Commission evaluate MISO’s proposal on the basis of both information provided by MISO and any substantive and specific issues that commenters provide in their review of the TEMT.

## **5. State Commission Access to Confidential Information**

Paragraphs 72-86 of the OMS Comments address the issue of State Commission Access to confidential information. The ICC disagrees with the contents of that section of the OMS Comments that suggest that the MISO proposal is adequate to allow states to obtain access to confidential information and strongly urges the Commission to disregard the OMS recommendation on this issue.

Many state commissions have a statutory obligation to protect the reliability of the electric delivery system, monitor the competitiveness of electric markets, and protect retail customers from the exercise of market power. Fully satisfying this obligation hinges on access to data and information regarding market transactions in the regional energy markets administered by MISO and by PJM. This data, when used in conjunction with other data

collected by the state commissions, would allow a more accurate and thorough examination of the electric marketplace and market transactions within the context of Midwest electricity markets. Without access to complete system and market data from across the Midwest electric market region, the ability of state commissions to monitor and prevent the exercise of market power imposed on electric consumers and ensure reliable system operations will be reduced.

While the ICC both acknowledges and appreciates the meaningful cooperation from both MISO and the Independent Market Monitor to craft TEMT language to meet the needs of the State Commissions in this regard, the ICC recommends that the Commission direct both MISO and its Independent Market Monitor to implement the following changes to the TEMT:

**A. The TEMT's Usage of the terms "Commercially Sensitive" and "Confidential Information" needs to be Clarified**

Section 54.3 of Module D discusses access to confidential data by interested governmental agencies. In particular, Section 54.3(c) states: "If an Authorized Requestor requests Confidential Information provided by a Market Participant that is not identified as "commercially sensitive" by the Market Participant who provided the data, the IMM shall provide the information to the Authorized Requestor under the process described in Section 38.8.4."

Section 54.3(d) states: "If an Authorized Requestor requests Confidential Information provided by a Market Participant that is identified and justified to the IMM as "commercially sensitive" by the Market Participant, the following process shall apply..."

The term "commercially sensitive" is not defined in either Module A or Module D of the TEMT. However, Section 1.37 of Module A defines "Confidential Information" as:

Any confidential, proprietary, or commercially sensitive information, or information of a plan, specification, pattern, [sic] procedure, design, device, list, concept, policy or compilation relating to the present or planned business of a

Transmission Customer, Market Participant, or other user, which is designated as confidential by the entity supplying the information, whether conveyed orally, electronically, in writing, through inspection, or otherwise, that is received by the Transmission Provider and is not disclosed except under the terms of a Confidential Informational policy.

Furthermore, Section 54.4 of Module D, describes “Confidential Information” as “data or information that is proprietary, commercially valuable or competitively sensitive, or is a trade secret and that has been designated as confidential by a Market, provided that such information is not available from public sources, or is not otherwise subject to disclosure under any tariff or agreement administered by the Transmission Provider.”

The conflicting language concerning confidential information, if left as written, may result in confusion. For example, Section 7(1)(g) of the Illinois Freedom of Information Act, which describes the types of information that may be kept confidential by the Illinois Commerce Commission addresses “trade secrets” and “commercial” information the disclosure of which “may cause competitive harm.”<sup>5</sup> “Trade secret” is a term already listed in Section 54.4 as a type of confidential information. However, the incongruity in the TEMT’s descriptions of “confidential information” with respect to the subset to be identified as “commercially sensitive” could cause misunderstanding and confusion in the future. Accordingly, the term “commercially sensitive” found in Section 54.3(c) and (d) should be changed to “competitively sensitive”. This change is necessary because as written, the tariff would result in different treatment of confidential information and commercially sensitive information – when in fact they are intended to be quite the same thing. The ICC seeks to close this loophole by having the term changed to competitively sensitive – a term that is already in the global definition of confidential

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<sup>5</sup> 5 ILCS 140/1 through 11.



information that is contained in the tariff.<sup>6</sup> Alternatively, the term “commercially sensitive” should be added to the list of the types of confidential information in Section 54.4.

The definition of “Confidential Information” in Module A only applies to information “received by the Transmission Provider.” That definition does not refer to information received by the independent market monitor. The Commission should direct MISO to correct this omission.

Finally, “Confidential Information” is defined as anything “which is designated as confidential by the entity supplying the information.” This language is too open-ended and provides an opportunity for material to be designated confidential when such designation may not be warranted. The ICC recommends that the Commission direct MISO to develop a process so that the designation of material as confidential could be challenged by stakeholders and MISO, as an independent third party, would determine whether a confidential designation is warranted.

**B. The TEMT should not Preclude an Authorized Requestor from Discussing or Sharing Confidential Data with Another Authorized Requestor**

Section 38.9.4(a) makes clear that an Authorized Requestor or its agency representative must demonstrate the ability to keep confidential information disclosed to it by MISO “confidential and non-public” and shall commit not to disclose the MISO’s confidential information “to third parties who are not Authorized Requestors.” Therefore, Section 38.9.4(a) does not prevent one Authorized Requestor from sharing and discussing confidential data received from MISO with another Authorized Requestor. However, the language in the corresponding paragraph in Section 54.3(d)(i) addressing confidential information received from

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<sup>6</sup> See, MISO Energy Markets Tariff, Module D, Section 54.4.

the IMM raises questions about whether or not one Authorized Requestor will be permitted to share or discuss confidential data received from the IMM with another Authorized Requestor.

Section 54.3(d)(i) states that when making a request from the IMM, an Authorized Requestor is required to provide the specific “statute, rule or regulations, or practice that will allow the Authorized Requestor to keep information disclosed hereunder confidential and non-public, of limited distribution within the Authorized Requestor and to prevent disclosure of information to third parties.”<sup>7</sup> This Section also provides that in the case of the OMS, “this requirement will be deemed to be met by the execution of a non-disclosure agreement with the IMM typical or customary to such agreements sufficient to bind individuals receiving information pursuant to this Section to keep such information confidential and not disclose the information to third parties.”<sup>8</sup>

If one Authorized Requestor must treat another Authorized Requestor as a “third party,” then the language of Section 54.3(d)(i) would prohibit one Authorized Requestor from sharing or discussing confidential data received from the IMM with another Authorized Requestor. However, this interpretation would establish an unwarranted inconsistency between Section 38.9.4(a) (applicable to MISO data) and Section 54.3(d)(i) (applicable to IMM data) and prevent needed communication. The ICC, therefore, recommends that MISO correct this inconsistency by inserting the words “who are not Authorized Requestors” at the end of each of the two sentences in Section 54.3(d)(i) quoted above.

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<sup>7</sup> TEMT, Section 54.3(d)(i)(underlining added).

<sup>8</sup> *Id.* (underlining added).

## CONCLUSION

WHEREFORE, the ICC respectfully requests that the Commission grant this motion to file comments out of time, consider these ICC Comments, adopt the recommendations contained herein, and grant any and all other appropriate relief.

Respectfully submitted,

*/s/ Christine F. Ericson*

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May 26, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that I caused copies of the foregoing document of the Illinois Commerce Commission to be served this day upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Chicago, Illinois, this 26th day of May, 2004.

*/s/ Christine F. Ericson*

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